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Dickens, Inc. and Wenqing Lin. Case 29–CA–28229

May 30, 2008

DECISION AND ORDER

BY CHAIRMAN SCHAMBER AND MEMBER LIEBMAN

On December 4, 2007, Administrative Law Judge Steven Fish issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,¹ findings,² and conclusions³ and to adopt the recommended Order and notice as modified.⁴

¹ The judge relied on the Respondent's vice president and owner James Chou's affidavit in making his findings. No party excepted to the judge's admission of the affidavit as substantive evidence.

² The Respondent excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

³ No party excepted to the judge's dismissal of the allegation that the Respondent violated Sec. 8(a)(1) by threatening to discharge employees if they requested improvements in their pay.

In affirming the judge's finding that the Respondent violated Sec. 8(a)(1) by instructing its employees not to discuss their bonuses with other employees, Chairman Schaumber notes that this violation was not alleged in the complaint. He recognizes, however, that the finding of a violation is consistent with extant Board law, which he applies for institutional reasons for the purpose of deciding this case. Thus, he joins in finding that the unalleged violation is related to the complaint allegation that the Respondent terminated Lin for engaging in protected concerted activity.

Member Liebman agrees with the judge that the unalleged violation is closely connected to the subject matter of the complaint and has been fully litigated. In her view, the finding that the Respondent instructed employees not to discuss their bonuses with other employees relates to the complaint's allegation that the Respondent terminated employee Lin because he engaged in protected concerted activity. Both violations stem from the same set of facts (i.e., the September 29, 2006 conversation between Lin and Chou), and both involve the Respondent's reaction to Lin's protected concerted activity during that conversation. Moreover, the issue was fully litigated, as both the General Counsel and the Respondent presented and cross-examined witnesses regarding the September 29 conversation. Finally, it is significant that, as noted by the judge, Chou admitted making the remarks upon which the violation is based. Under such circumstances, she believes it is particularly appropriate for the Board to find and remedy the unalleged violation. See, e.g., *Earthgrains Co.*, 351 NLRB No. 45, slip op. at 4 (2007); *Meisner Electric*, 316 NLRB 597 (1995).

In affirming the judge's finding that Wenqing Lin's termination violated Sec. 8(a)(1), we find that the Respondent knew that Lin engaged in concerted activity when he complained to Chou about the bonus rate

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Dickens, Inc., Commack, NY, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(c).

"Within 14 days from the date of the Board's order, remove from its files any reference to the unlawful discharge of Lin, and within 3 days thereafter notify the employee in writing that this has been done and that the discharge will not be used against him in any way."

2. Substitute the following for paragraph 2(e).

"Within 14 days after service by the Region, post at its Commack, New York facility, copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Re-

he and two coworkers received. The Respondent knew or should have known that Lin was presenting a group complaint to management because Lin's complaint was raised in the same conversation and at the same time as his coworker's request to Chou for an increase in bonus rates, and his complaint on its face implied group involvement. After Lin's coworker asked Chou if a bonus increase was possible, Lin added that the bonus rate "we" have was only two out of a thousand. Lin then continued to question Chou about the bonus rates for other employees.

We additionally conclude that the timing of Lin's termination 2 days after Lin engaged in protected concerted activity further supports the judge's finding that his termination was unlawfully motivated. See, e.g., *American Cyanamid Co.*, 301 NLRB 253 (1991) (finding that the timing of the employee's discharge a week after engaging in protected concerted activity warranted an inference that the activity was a motivating factor in his discharge).

⁴ We have modified the judge's recommended Order and notice to correct certain inadvertent errors.

Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Schaumber and Member Liebman constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

⁵ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

spondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 29, 2006.”

3. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. May 30, 2008

Peter C. Schaumber, Chairman

Wilma B. Liebman, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT tell our employees not to discuss their bonuses, wages, or any other terms and conditions of employment with one another.

WE WILL NOT discharge or refuse to reinstate our employees, because said employees engaged in protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL within 14 days from the date of the Board's Order, offer Wenqing Lin full reinstatement to his former job or, if this job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Lin whole for any loss of earnings and other benefits suffered as a result of the discrimination against Lin plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Lin, and within 3 days thereafter notify the employee in writing that this has been done and that the discharge will not be used against him in any way.

DICKENS, INC.

Henry Powell and Tabitha Boerschinger Esqs, for the General Counsel.

James Chou, Vice President and Owner of Commack, New York, for the Respondent.

DECISION

STATEMENT OF THE CASE

STEVEN FISH, Administrative Law Judge. Pursuant to charges filed on March 21, 2007 by Wenqing Lin, an Individual, (called Lin), the Director for Region 29, issues a Complaint and Notice of Hearing on July 19, 2007, alleging that Dickens, Inc. (called Respondent), violated Section 8(a)(1) of the Act, by threatening employees with discharge if they requested improvements in their pay, and by discharging Lin, because he engaged in protected concerted activity.

The trial with respect to the allegations raised in said Complaint was held before me in Brooklyn, New York on August 20 and 21, 2007. Briefs have been filed and have been carefully considered. Based upon the entire record, including my observation of the demeanor of the witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Employer is a corporation, with its principal office and place of business in Commack, New York, where it is engaged in the wholesale distribution of greeting cards and social stationary.

During the past year, Respondent purchased and received at its Commack facility, goods and products valued in excess of \$50,000 directly from entities located outside the state of New York.

It is admitted and I so find, that Respondent is and has been an Employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. FACTS

Respondent, as noted above is engaged in the wholesale distribution of greeting cards and stationary. James Chou is Respondent's vice-president and owner.

Wenqing Lin, had been employed by Respondent as a warehouse employee since August 1, 1998. Qui Shen Liu and Miaona Wu have been employed by Respondent in a similar capacity, since 2004 and 2000 respectively. Their job consisted of filling orders which entails reading orders, carrying and stocking boxes, and preparing orders to be shipped.

Respondent has for some time employed a system of paying

bonuses to its employees, which is calculated based on a comparison of monthly sales figures to the same month, the prior year. Respondent would then calculate the amounts due based on different percentages for different employees, ranging from 0.2 percent to 0.5 percent. Lin, Liu and Wu all received the same percentage, 0.2 percent or \$2 per thousand.

In early 2006,¹ Respondent's chief competitor went out of business. As the major greeting card supplier in the area, Respondent picked up more business, and was able to earn increased monthly profits. This resulted in bonuses for its employees. In July, Respondent hired three new employees, and decided not to give bonuses to these new employees, who were primarily college students.

Lin, Liu and Wu, as long term employees received their bonus, which amounted to over \$800 per person. On September 29, Lin, Wu and Liu were cleaning up outside their work area and preparing to leave for the day. Chou approached the three employees, and said that business continues to be good, and that employees should expect to receive a bonus again for this past month.

He added that employees had received over \$800 per month as a bonus. Wu responded by asking how long this kind of bonus can last? Chou replied that he didn't know, but he thought it should last for a while. Wu then stated that since business was getting better, at the same time, their work became more busy. Wu then asked if it was possible for the bonus to be increased?

Chou made no response to Wu's inquiry, but Lin then interjected himself into the conversation. Lin said that the bonus rate that we² have was only two out of a thousand. Lin asked whether new employees would be receiving the bonus. Chou replied that the new employees would not be receiving any bonus, and added "do me a favor, you are getting paid much more than anybody else, please keep silent, don't have a big mouth. You are making over \$800 per month, in bonuses, and I cannot afford to pay that to everyone." Lin then questioned Chou about the bonus rates for office employees and that of employee Jian Ping Chiang. Chou explained that everyone has different nature and scope of work, and that's why bonuses vary. Lin asked if Chiang's rate is four out of a thousand. Chou confirmed that amount for Chiang, but asked how Lin had found out about Chiang's rate? Lin did not answer Chou's question. Chou then explained why Chiang received a higher bonus than Wu, Lin, and Liu, pointing out Chiang's 18 years seniority, and his ability to speak English and drive a truck, and the fact that Chiang works with clients and sales people. Lin then asked about the office employees. Chou responded that the sales manager received a higher bonus, but that the office staff received the same 0.2 percent as Lin (and Wu and Liu). Lin then asked Chou if he was telling the truth? Chou answered that this is the truth. Chou conceded that he was getting annoyed with Lin's questioning his veracity in front of other employees. Chou stated, that "Lin was confronting me, but I kept my temper."

¹ All dates hereafter are in 2006, unless otherwise indicated.

² When using the term we, Lin testified that he was referring to himself, Wu, and Liu.

My findings detailed above, concerning the events of September 29 is based on a compilation of the credible portions of the testimony of Lin, Wu, and Chou, as well as Chou's affidavit and the affidavit submitted by Wu to the Region. With respect to the latter document, the significant fact continued therein, which I have credited over Wu's testimony, was that Wu asked Chou if the employees' bonus could be increased, in view of the increase in business. While Wu did not recall making such a comment during her testimony, I have, based on the circumstances here, credited her affidavit in this respect.

I find that Wu was most reluctant to testify here, was still employed by Respondent, and felt intimidated to testify on behalf of Respondent. In this regard the record reveals that in preparation for filing its answer to the above complaint, Respondent by Chou obtained affidavits from Wu and Liu in a group setting. In fact the affidavits of Wu and Liu submitted by Respondent along with its answer, were identical concerning the events of September 29th. I find that the affidavit supplied by Wu to the Board to be more reliable, than her testimony, and I rely on said affidavit as substantive evidence. *L.S.F. Transportation*, 330 NLRB 1054, 1065 (2000); *Three Sisters Sportswear Co.*, 312 NLRB 853, 865 (1993); *New Life Bakery*, 301 NLRB 421, 426 (1991); *Snaider Syrup*, 220 NLRB 238, 238 fn.1, 245 (1975); *Starlite Mfg*, 172 NLRB 68, 72 (1968).

Respondent argues that Wu's affidavit should not be relied upon, because of the circumstances that motivated her to give such an affidavit to the Region. In that regard, in February of 2007, Chou asked Wu to clean the toilets, because the employee who usually performed that task was on vacation. Wu refused to do so, because she wanted to go to lunch. Chou also asked Liu to perform this job, but he also refused, claiming that he had allergies. These refusals angered Chou, and two days later he informed Liu and Wu that Respondent would be eliminating their holiday pay and vacation benefits. Neither employee received holiday pay for President's day on February 19. Wu took a vacation from March 16 to April 9, and was not paid for her vacation, as she had been in the past. Wu was quite upset about Respondent's decision to cancel these benefits for her. Lin filed his charge in the instant case on March 21, 2007. Thereafter Lin had a conversation with Wu. Lin told her that he had filed a complaint with the NLRB, and she told him that she was unhappy that Respondent had canceled her vacation and holiday benefits. As a result of this conversation, Wu went to the NLRB to furnish an affidavit on May 22, 2007. The affidavit consisted of four pages. The first five paragraphs of the affidavit dealt with Lin's charge, and detailed her version of the events of September 29th and thereafter. The remainder of the affidavit, consisting of 7 paragraphs dealt with her complaints about the cancelling of her vacation and holiday benefits.

Respondent argues in effect that this affidavit should not be credited, because Wu was unhappy with Respondent at the time, and presumably gave false testimony in the affidavit, because she was displeased with Respondent. I do not agree. To the contrary, I believe that these facts further support my conclusion to credit the affidavit over her testimony with respect to the issues in dispute. In my view, the fact is Wu was unhappy with Respondent, and that she went to the Region

primarily to register her own complaint about the cancellation of her benefits, do not indicate that her affidavit was likely to be false. Further, since she was there primarily to register her own complaint,³ her version of the events relating to Lin's case was merely incidental, and not likely to be fabricated. Further, I am persuaded that the fact that Respondent would cancel her vacation and holiday benefits, (whether this action is unlawful or not), because she refused to clean toilets, supports my conclusion that Wu was intimidated by Respondent, and gave her affidavit to Respondent and testified as she did, in fear of further retaliation by Respondent. I therefore find, for the reasons detailed above, that her affidavit given to the Board is more reliable, than her testimony, with respect to whether she asked Chou for an increase in the bonus rate on September 29th. *L.S.F. Transportation*, supra; *Three Sisters*, supra and cases cited therein.

Finally, I also note that Wu was somewhat equivocal in her testimony that she did not make such a request. Thus she admitted that she did not recall clearly what she said on September 29, and when confronted with her affidavit by General Counsel, Wu finally conceded that she might have made such a comment, but she was kidding around. Her response was as follows: "I would say that at that time since we were like joking around in a happy manner and then I might have said something like maybe you can give us more bonus, but it was like. . . like kidding around in a very informal manner."

Accordingly, based on the foregoing, I find that Wu did, as detailed above, ask Chou for an increase in the bonus rate for employees, before Lin interjected himself into the conversation, and gave his comments and asked his questions concerning the bonus issue.

Lin testified that on the next workday, Monday, October 2, after a general meeting of employees, Chou spoke to Liu, Lin, and Wu. According to Lin, Wu spoke first, and said that business is getting better, we have a lot of orders and that is why we wanted to increase our bonus. Lin further asserts that Chou did not respond, but as he was walking out of the room, Chou allegedly said "whoever talks about increasing the bonus would be fired." Lin further testified that he (Lin) then said "you should just fire me."

Lin also testified that later in the day, at about 5:20 p.m. Chou called him into his office, with no one else present. Lin asserts that Chou told him that if he wants higher income, he should look for another job, and added that "whoever asks for an increase in wages or with benefits would be fired." According to Lin, later in the conversation, Chou told Lin that Respondent was going to fire him, and instructed Lin to go home and think through it.

I do not credit Lin's testimony concerning these conversations on October 2. I note that unlike the September 29 conversation detailed above, Lin received no corroboration from Wu or from her affidavit with respect to October 2 conversations, or to Lin's assertion that Chou threatened to discharge employees

who talk about bonuses. I also rely on the fact that both Wu and Liu although allegedly present when Chou made this threat, credibly denied hearing Chou make such a statement.⁴

Furthermore, Chou testified credibly and passionately that he did not and would not threaten employees with termination with discharge if they discussed or complained about wages or benefits. Chou testified further, credibly and without any contradictory evidence, that numerous employees including Lin have complained to him in the past about their wages, and he has not fired anyone for such conduct. Chou also credibly testified, corroborated by testimony from Kenneth Wagner, Respondent's Director of Marketing, that Wagner on two prior occasions, including in July of 2006, had proposed to Chou that Respondent institute a rule that employees be prohibited from discussing their pay or bonus.⁵ Chou vetoed Wagner's suggestions on both occasions, telling Wagner that such a rule would violate a 25 year open door policy that Respondent has had with its employees.

For the above reasons, I do not credit Lin's testimony concerning the events of October 2, and find that Chou did not threaten to terminate or discharge employees, if they complained about or discussed their pay or bonuses.

On October 3, at the end of the day, Chou called Lin into his office and told him that he was being fired because he and Chou "could not get along well." Lin replied that this was the first time he had heard about this and asked for specifics. Chou made no reply, and Lin insisted on something in writing explaining the termination. Chou agreed and typed up a letter which stated that Lin was terminated "because of a personality conflict with the undersigned."

Chou explained what he meant by "personality conflict" in his affidavit. His affidavit states "I believe that Lin is an a—hole and has an a—hole attitude. He questioned my honesty and integrity in front of other employees." Chou admitted that the questioning of his honesty and integrity by Lin was in connection with the issue of bonus rates of employees.

Chou further admitted in his testimony that the primary factor in his decision to fire Lin was Lin's "a—hole attitude" about the bonus. Chou added later in his testimony that he was unhappy with Lin, because the "bonus is really the highest time I ever had in this past ten years. Okay? And even if \$800 bonus I cannot please him and he's still not happy, how I can . . . !"

While admitting that Lin's conduct during the September 29 discussion, was the precipitating factor, in his decision to terminate Lin, Chou testified that there were also other reasons that contributed to his decision. Chou asserts that Lin's work performance was poor and that he had previous conflicts with fellow workers. Chou claims that Lin's capacity was limited, in that he was able only to pick up small pieces, and was not

³ It does not appear that Wu filed a charge on her own behalf with regard to the cancellation of her benefits. There is no evidence that the Region solicited a charge from her. The Region did not allege in the complaint that the cancellation of her benefits was unlawful.

⁴ I again note the affidavit given to the Board by Wu, which I have relied on in connection with the September 29 incident, does not corroborate Lin's testimony as to October 2, and specifically states that Wu never heard Chou threaten employees with discharge if they discussed pay or benefits with the other employees.

⁵ Wagner had previously worked for a store that had such a rule in its handbook. Wagner felt that such a rule would be advisable for Respondent, because employees talking about these issues could "cause problems."

physically able to move large boxes. Chou adds that at times, Lin refused to do some work, and had several disputes with supervisors and employees. Respondent adduced evidence from Chiang, that at some undefined time in the past, Lin had a loud argument with fellow employee Liu Bo during which, “they almost fight each other.” Neither employee was disciplined for this loud argument. Wu testified to an incident “many years ago,” when Lin refused to clean the bathroom, and had a loud argument with a supervisor at the time about that work assignment. According to Wu, at the time, employees would rotate cleaning the bathroom, on a monthly basis, and it was Lin’s turn to clean the bathroom, when Lin refused to perform that work. Lin was not terminated or disciplined for this conduct.

Chou testified that sometime in 2002, he terminated Lin, because of his alleged limited capacity and his refusal to perform work. Chou claims that at that time, Lin’s wife telephoned Chou, and begged him not to fire her husband. According to Chou, Lin’s wife asked him to do her a favor, and rehire Lin and let him stay “for a few more years, so he can retire and get his social security.” Chou testified that he relented and rehired Lin in 2002.⁶

Chou also testified that another reason for his decision to terminate Lin, was cost savings issues, since he could hire younger employees, who could speak English fluently, at lower salaries, who could perform tasks, such as lifting heavy boxes, that Lin was allegedly unable to perform.⁷

In this regard the evidence, discloses that Liu (\$8.50) and Wu (\$9.25), had higher salaries than Lin, and also had the same limited capacity (i.e. inability to lift heavy boxes, and limited capacity to speak English).

Finally, Respondent notes that Lin filed a charge with the EEOC, which asserts that he was terminated by Respondent because of his age. With Lin’s charge filed with the EEOC on December 6, 2006 he submitted a letter of Complaint, which included Lin’s belief that he was fired because of his age. The letter made no reference to the events of September 29, 2006, or any claim that he was fired for the exercise of protected concerted activity.

Further in connection with this EEOC charge, Chou submitted a response. In this response, which related to why he terminated Lin, Chou explained that Lin had questioned him about bonuses of other employees and related that Lin “started questioning me in front of other associates if I was telling the truth.” Chou added that he was “angry,” because of this conduct by Lin, and added, “The next day I called Mr. Lin in my office and told him that I can never please or satisfy some people like him regardless how hard I try, and the longer he works for this company, the more he feels I owe him, we had a ‘serious personality conflict,’ and I decided to let him go.”

⁶ Lin denied that he had been terminated by Respondent in 2002. Lin did recall that in 2002, while he was out sick, Chou called and told him not to return to work, and that Chou planned to retain younger workers. Lin conceded that his wife had called Chou, and persuaded Chou to allow Lin to return to work after he recovered from his illness.

⁷ The new employees could be hired according to Chou at \$8 per hour. Lin’s salary was \$8.25 per hour.

III. ANALYSIS

A. The Alleged Threat to Discharge

The Complaint alleges that Respondent violated Section 8(a)(1) of the Act, by Chou threatening to discharge employees, if they requested improvements in their pay.

Since I have not credited the testimony of Lin that Chou made such threats, I shall recommend dismissal of this allegation of the complaint.

However, I have found above, and Chou admitted in both his testimony and his affidavit, that he instructed employees not to discuss their bonus with other, recently hired employees, who would not be receiving such a bonus. Such comments reasonably tend to coerce employees in the exercise of Section 7 rights, (to discuss their terms and conditions of employment with fellow employees), and absent a substantial and legitimate business justification, is violative of Section 8(a)(1) of the Act. *Radisson Plaza Minneapolis*, 307 NLRB 94 (1992); *Heck’s Inc.*, 293 NLRB 1111, 1119 (1989); *Waco Inc.*, 273 NLRB 746, 748 (1984); see also, *Scientific Atlanta, Inc.*, 278 NLRB 622, 625 (1986); *Miller Electric Pump*, 334 NLRB 824, 825 (2001).

Here Respondent has adduced no evidence of a substantial business justification, for Chou’s instruction to its employees. Chou’s belief that there could be dissension if the new employees who did not receive the bonus found out about the bonus, is not a substantial or sufficient business justification. That argument could be made in any case, where employees are prohibited from discussing wages. *Cf. IBM Co.*, 265 NLRB 638 (1982) (Substantial business justification shown, for rule prohibiting distribution of wage data, complied by Employer but which did not prohibit employees from discussion their wages with other employees); *Jeannette Corp. v. NLRB*, 532 F.2d 916, 919 (3d Cir. 1976) (Possibility that ordinary speech and discussion over wages on an employee’s own time may cause jealousy and strife among employees is not a justifiable business reason to inhibit opportunity to exercise Section 7 rights). *Accord Scientific*, supra.

I recognize that the Complaint did not allege that Respondent violated the Act by such conduct of Chou. However, it did allege that Chou violated Section 8(a)(1) of the Act, by threatening to discharge employees, who discussed wages and benefits with fellow employees. Moreover, the testimony concerning this statement made by Chou, come from Chou’s own testimony, and appeared in his affidavit. In these circumstances, I find that the issue is closely connected to the subject matter of the Complaint and has been fully litigated. *Trim Corp. of America*, 349 NLRB No. 56 Slip op. at 2 (2007); *Golden State Foods*, 340 NLRB 382 (2003). In that regard, this rule has been applied with particular force, where, the finding of violation is established by the testimonial admissions of the Respondent’s own witnesses. *Transpersonnel Inc.*, 336 NLRB 484, 485 (2001); *Letter Carriers Local 3825 (Postal Service)*, 333 NLRB 343, fn. 3 (2001); *Meisner Electric Inc.*, 316 NLRB 597 (1995); *Pergament United States*, 296 NLRB 333, 334 (1989), *enfd.* 920 F.2d 130 (2d Cir. 1990).

Accordingly, I find that by Chou’s conduct in instructing employees not to discuss their bonuses with other employees, Respondent has violated Section 8(a)(1) of the Act.

B. The Termination of Lin

The standards for assessing the legality of Lin's termination is detailed in *Meyers Industries*, 268 NLRB 493, 497 (1984) (*Meyers I*).

In general, to find an employee's activity to be "concerted," we shall require that it be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself. Once the activity is found to be concerted, an 8(a)(1) violation will be found if, in addition, the Employer knew of the concerted nature of the employee's activity, the concerted activity was protected by the Act, and the adverse employment action at issue (e.g., discharge) was motivated by the employee's protected concerted activity. [Footnotes deleted].

And as clarified in *Meyers Industries*, 281 NLRB 882, 887 (1986) (*Meyers II*).

We reiterate, our definition of concerted activity in *Meyers I* encompasses those circumstances where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management.

Thus the determinative issue here is whether Lin engaged in concerted activity, during the discussions of September 29th. I have found above that Chou approached Lin, Wu, and Liu, three primarily Chinese speaking warehouse employees, all of whom had received the same 0.2 percent bonus from Respondent. Chou began the conversation by informing the three employees that business continues to be good, they had received a bonus of \$800 per month and they should expect to receive a bonus again for the next month. Wu after asking how long the bonus can last, stated the employees work became more busy, and asked if it was possible for the bonus to be increased.

Lin, at that point, interjected himself into the conversation, and said that the bonus rate that we (emphasis supplied) get was only two out of a thousand. Lin continued to press Chou for an increase in the bonus rate, and inquired about the bonus rates of other employees, including office workers. Although Chou responded to Lin's persistent inquiries, Lin asked if Chou was telling the truth in his responses to Lin concerning the rates for other employees. Chou considered that Lin was questioning his veracity in front of other employees, and terminated Lin, primarily, if not solely for Lin's conduct on September 29.

I conclude that there is little doubt, that by Lin's conduct in supporting Wu's request for a raise in the bonus rate, he was engaged in protected concerted activity. *Hahmer Foreman & Harness*, 343 NLRB 1423, 1424 (2004) (Two employees protested loss of benefits); *Bowling Transportation*, 336 NLRB 393, 400-401 (2001) (Two employees requested increase in safety bonus); *Avery Leasing*, 315 NLRB 576, 580 (1994) (Two employees complained about seniority system); *Morton International*, 315 NLRB 564, 566 (1994) (Two employees complained about smoking policy); *E.L. Gran Combo*, 284 NLRB 1115, 1117 (1987) (Two employees complaints about wages); *Churchill's Catering*, 276 NLRB 775, 776 (1985) (One employee complained about reduction in insurance coverage. Second employee supported first employee's complaint and

accused Employer of prejudice against Mexicans).

Further, where as here, the Employer initiates a discussion about a term and condition of employment with its employees, an employee who comments concerning that issue, particularly where he or she uses the first person plural in making their complaint, is engaged in concerted activity. *Whittaker Corp.*, 289 NLRB 933, 934 (1988) (Employee complaint at group meeting about wage increases, phrased in terms of "us" and "we"); *Bergensons Property Services*, 338 NLRB 883, 886 (2003) (Employee complaints at group meeting); *CKS Tool & Engineering*, 332 NLRB 1578, 1583-1585 (2000) (Employee, at group meeting, complained about Employer's demand for increased production, using the term "we"); *Air Contact Transport*, 340 NLRB 688 (2003) (Employee at group meeting, stated that they had "some questions on behalf of myself and other co-workers."); *Grimmway Farms*, 315 NLRB 1276, 1279-1280 (1995) (Employee complained at a group meeting about how Employer treated fellow employee used the term "we" wanted to know); *Colders Furniture*, 292 NLRB 941, 944-945 (1989) enfd. 907 F.2d 765, 768 (7th Cir. 1990) (Salesman in complaining about hours, used "we", several times).

Here, Chou initiated the discussion about bonuses with the three employees, and when Lin made his initial complaint to Chou about the size of the bonus, Lin said the bonus rate that we had (emphasis supplied) was only two out of a thousand.⁸

Accordingly, based on the above analysis and precedent, I conclude that Lin was engaged in concerted activity on September 29, in his discussions with Chou about bonus rates.

Having found that Lin engaged in concerted activity during the September 29 meeting, I still must determine whether it was protected by the Act. In this regard, the Board has held that there are limits as to how far an employee can go in the course of exercising their concerted activity, in order to retain the Act's protection. However, it is well settled that an "employee's right to engage in concerted activity may permit some leeway for impulsive behavior which must be balanced against the employer's right to maintain order and respect. *NLRB v. Thor Power Tool Co.*, 351 F.2d 584, 587 (7th Cir. 1965); *Mast Advertising Co.*, 304 NLRB 819, 820 (1991); *Neff Perkins Co.*, 315 NLRB 1229, 1233-1234 (1994); *Bergenson's Property*, supra at 884. The test is whether the conduct of the employee was so egregious that it renders him "unfit for further service." *Chromolloy Gas Turbine Corp.*, 331 NLRB 858, 863 (2000), enfd. 168 LRRM 2180 (2nd Cir. 2001); *Thor Power*, supra; *Cibao Meat Products*, 338 NLRB 934, 935 (2003).

Here the alleged misconduct by Lin, which so angered Chou, consisted merely of Lin's persistent questioning of Chou about the bonus rates of other employee, and Lin's asking Chou if he was telling the truth about such rates, which Chou deemed as insulting, and "questioning his veracity in front of other employees." Such comments by Lin do not come close to meeting the stringent standard of egregious conduct, rendering Lin unfit for service, which would remove Lin's concerted conduct from the Act's protection. Indeed, far more insulting or profane

⁸ By we, Lin meant himself, Liu and Wu, who were the three employees that were approached by Chou to discuss bonuses, and who all had the same bonus rate.

comments have been found not to be unprotected. *Neff Perkins*, supra, at 1233. (Employee told supervisor to “shut up and sit down,” and made profane comments such as “shitty”); *Chromolloy Gas*, supra (Employee argumentative and confrontational and according to company “disparaged company official in front of other employees,” and made official “look like a fool”.); *Stanford N.Y.*, 344 NLRB 558, 559 (2005) (Employee called boss a “f—ing son of a bitch.”); *United Enviro Systems*, 301 NLRB 942, 944 (1991) (Profanity used by salesman in complaining about work assignments); *CKS Tool*, supra, at 1583, 1585–1586 (Employee made several profane and insulting comments to management official at meeting); *Churchill’s Restaurant*, supra, at 777 (Employee accused boss of being “prejudiced against Mexicans”).

Therefore having found that Lin was engaged in protected concerted activity on September 29, the next issue becomes whether Respondent terminated him for that conduct. In that regard, the General Counsel must first establish that this conduct of Lin was a motivating factor in Respondent’s decision to discharge him. *Wright Line*, 251 NLRB 1083 (1980), enf’d. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). There can be no doubt that General Counsel has met that burden. Indeed, Respondent has virtually admitted in the testimony of Chou, as well as in his affidavit, that Lin’s protected conduct was at least a factor, if not the primary factor, in Respondent’s decision. Thus Chou admitted that his decision to terminate Lin because of “personality conflicts,” was based primarily on Lin’s conduct on September 29th, particularly Lin’s questioning Chou’s veracity or honesty in front of other employees. Since the questioning of Chou’s veracity was in connection with Lin’s concerted complaint about bonus rates, this conduct is part and parcel of Lin’s protected conduct. Moreover, Chou also admitted that Lin had an “a—hole attitude” about the bonus, since even with an \$800 bonus, “I cannot please him,” thereby demonstrating Chou’s annoyance that Lin would have the temerity to request a raise in the bonus rate for employees.

Since I have found that General Counsel has established that a motivating factor in Respondent’s decision to discharge Lin, was Lin’s protected conduct,⁹ the burden shifts to Respondent to establish by a preponderance of the evidence that it would have terminated Lin, absent such protected conduct. *Wright Line*, supra, Respondent has fallen far short of meeting its burden in this regard.

Indeed while Chou did testify concerning several other alleged reasons for his decision to discharge Lin, he did not testify, nor does the record establish, that any of these reasons, singly or collectively, would have been sufficient to persuade Respondent to terminate Lin, absent his protected conduct. See *St. Barnabas Hospital*, 334 NLRB 1000, 1015 (2001) (Respondent must establish that it would have terminated employees

absent their protected conduct. Insufficient to establish that “primary” reason was unprotected conduct).

Further the other reasons given by Chou, which allegedly caused him to terminate Lin, do not withstand scrutiny. Chou asserts that Lin had previous conflicts with fellow workers. While Respondent did adduce some evidence of this conduct, Lin was never warned or disciplined for any of these incidents, which I might add, took place years ago. Chou also testified that he terminated Lin in 2002, for these incidents, as well as a general inability to perform work, and was persuaded to take Lin back, after a plea from Lin’s wife. Whether or not this incident took place as testified to by Chou,¹⁰ it cannot justify terminating Lin 4 years later.

Chou also testified that part of his decision was “cost savings”, inasmuch as Lin cannot lift heavy boxes, and did not speak English, and Chou could hire college students at \$8 per hour, who could speak English and were capable of lifting heavy boxes. However, I note initially that Lin’s salary was \$8.25 per hour, only a 25-cents-per-hour difference from what Respondent was paying the college students. This is hardly a significant difference, and I find that this assertion by Respondent is clearly pretextual. I note that Liu and Wu had higher salaries than Lin, and also speak limited English. More importantly, Respondent could have enjoyed cost saving at any time, by hiring more college students, and terminating Lin, but it did not do so, until Lin engaged in protected conduct on September 29. In my view, it is clear that Lin’s protected conduct was the sole and only reason for Respondent’s decision to terminate him. In any event, it is even clearer, that Respondent has failed to show that it would have discharged Lin, absent his protected concerted activity, and has therefore violated Section 8(a)(1) of the Act. I so find.

CONCLUSIONS OF LAW

1. Respondent, Dickens Inc., is an employer engaged in commerce within the meaning of Section 2(2) and (6) of the Act.
2. Respondent, by ordering, instructing and requesting its employees to refrain from discussing bonuses with other employees, has violated Section 8(a)(1) of the Act.
3. Respondent, by terminating the employment of Wenqing Lin, because he engaged in protected concerted activities, has violated Section 8(a)(1) of the Act.
4. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and refrain and to take certain affirmative action designed to effectuate the policies of the Act.

I shall recommend that Respondent offer reinstatement to Wenqing Lin to his former position of employment and make him whole for the discrimination against him, plus interest, as computed in *F.W. Woolworth*, 90 NLRB 289 (1950) and *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

⁹ Respondent’s reliance on Lin’s EEOC charge misplaced. Although Lin may have alleged different reasons (age discrimination) in that charge, that does not mean that there may not have been other unlawful reasons, i.e. his protected concerted activity for the discharge. Further, Chou’s response to that EEOC further establishes the unlawfulness of Respondent’s conduct. Chou admitted therein that Respondent fired Lin for questioning him about bonuses in front of other employees.

¹⁰ Lin had a different version as related above. I need not resolve this credibility dispute.

Based on the foregoing findings of fact and conclusions of law and on the entire record, I issue the following recommended¹¹

ORDER

The Respondent, Dickens Inc., Commack, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from
 - (a) Telling employees not to discuss their bonuses, wages or any other term and condition of employment, with one another.
 - (b) Discharging or refusing to reinstate their employees, because said employees engaged in protected concerted activities.
 - (c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.
2. Take the following affirmative action necessary to effectuate the policies of the Act.
 - (a) Within 14 days from the date of the Board's Order, offer Wenqing Lin full reinstatement to his former job or, if this job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.
 - (b) Make Lin whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.
 - (c) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharge of Lin, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges will not be used against them in any way.
 - (d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.
 - (e) Within 14 days after service by the Region, post at its facility in Commack, New York, copies of the attached notice marked "Appendix."¹² Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in con-

¹¹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

¹² If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

spicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 29, 2006.

Dated, Washington, D.C. December 4, 2007.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT tell our employees not to discuss their bonuses, wages, or any other terms and condition of employment with one another.

WE WILL NOT discharge or refuse to reinstate our employees, because said employees engaged in protected concerted activities.

WE WILL NOT in any like in related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL within 14 days from the date of the Board's Order, offer Wenqing Lin full reinstatement to his former job or, if this job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Lin whole for any loss of earnings and other benefits suffered as a result of the discrimination against Lin plus interest.

WE WILL within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Lin, and within 3 days thereafter notify the employee in writing that this has been done and that the discharge will not be used against him in any way.

DICKENS, INC.